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C O N F I D E N T I A L SECTION 01 OF 02 HONG KONG 000043

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STATE FOR EAP/CM AND EEB/BTA/TPP, STATE PASS FTC FOR  
WILLIAM KOVACIC, DOJ FOR STUART CHEMTOB

E.O. 12958: DECL: 12/11/2019  
TAGS: [ECON](#) [EFIN](#) [EINV](#) [ETRD](#) [HK](#) [CH](#)  
SUBJECT: NEW COMPETITION LAW EXPECTED TO EXEMPT MANY HONG  
KONG GOVERNMENT ENTERPRISES

REF: HONG KONG 1854

Classified By: A/CG Christopher Marut for reasons 1.4 (b) and (d).

¶1. (C) SUMMARY: Commerce and Economic Development (CEDB) Bureau Undersecretary Greg So told U.S. Federal Trade Commissioner William Kovacic on December 8 that the Hong Kong government's (HKG) long-anticipated Competition Law will likely be submitted to Hong Kong's Legislative Council (LegCo) by June 2010. So solicited Kovacic's advice in several technical areas related to regulating anti-competitive corporate behavior, as CEDB finalizes the draft bill. LegCo member Ronny Tong, a key proponent of the Competition Law, told Kovacic that the HKG "unfortunately" intended to exclude "many government-owned or controlled enterprises" from the law's purview. This not-yet-announced list of excluded entities has become the most controversial element of the new law. Companies unrelated to the government remain wary that the HKG will protect large numbers of government-affiliated entities from scrutiny. At a competition law forum on December 7 in Hong Kong, regulators from the PRC described their efforts to enforce the country's "Anti-Monopoly Law" that took effect in August 2008. End summary.

¶2. (C) COMMENT: Private sector discontent with the draft Competition Law bill will likely increase, once the HKG announces the list of government-affiliated entities it wishes to exclude from the new law's purview. Private corporations in various sectors of Hong Kong's economy will likely object to such exclusions, citing "unfair" advantages enjoyed by many government owned or controlled entities engaged in commercial activities (e.g. the convention center in central Hong Kong). Should the list of excluded government-affiliated entities be substantial, as expected, the new law may have little impact on local corporate competition dynamics - especially in Hong Kong's relatively high number of oligarchic economic sectors. Given the modest expected impact of the law, industry observers question the HKG's motives in pursuing it. They say the HKG does not want to be in the small minority of developed economies with no specific, pan-economy statute governing anti-competitive corporate behavior. End comment.

Background  
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¶3. (U) Federal Trade Commissioner William Kovacic spoke at a regional corporate competition law forum on December 7 in Hong Kong. He also met with government officials, academics, the local consumer council, and a LegCo member to discuss Hong Kong's proposed Competition Law. Hong Kong currently has no specific law that addresses damaging corporate behavior such as price fixing, bid rigging and monopoly-building (other than a statute limited to the

telecommunications and broadcasting sectors). FTC Commissioner J. Thomas Rosch also visited Hong Kong in September 2009 to discuss the HKG's proposed new law (reftel).

#### Draft Competition Law Coming by June 2010

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14. (C) CEDB Undersecretary Greg So told Kovacic on December 8 that the HKG will deliver the draft Competition Law bill to the LegCo by June 2010. He said the bill will establish a judicial rather than administrative model to enforce provisions governing anti-competitive corporate behavior. The new Competition Law will set up a Competition Commission to investigate and prosecute cases, while a Competition Tribunal will be established as a specialized court within the Judiciary to hear and adjudicate all cases related to the Competition Law. Prosecutions under the new law will result in civil rather than criminal penalties. So said the HKG is inexperienced in prosecuting cases involving anti-competitive behavior, and the government wishes to minimize prosecutions of Competition Law offenders. He said CEDB has therefore included an "Infringement Notice Scheme" in the draft bill, under which the HKG will notify a party deemed to violate the new law and offer an out-of-court settlement fine.

15. (C) So solicited Kovacic's advice regarding several sections of the bill, including the best means to staff and run the new Competition Tribunal. Kovacic supported the Competition Tribunal concept and the HKG's intention to develop specialized anti-trust skills among the judges selected to sit on the Tribunal. Kovacic recommended that

HONG KONG 00000043 002 OF 002

Competition Tribunal judges also be given tasks and cases outside the realm of the Competition Law, as a means to attract the best candidates and boost their job satisfaction.

Given the relatively small size of Hong Kong's economy, Kovacic recommended that the HKG establish good working relationships with key foreign anti-trust regulators in the much larger jurisdictions of Hong Kong's primary trading and investment partners. This would enable Hong Kong to benefit from those jurisdictions' "heavy lifting" on large cases that affect entities operating in Hong Kong.

#### Government-Affiliated Entities To Be Exempted

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16. (C) While the broadcasting and telecommunications sectors will be covered under the new law, So acknowledged that "several of Hong Kong's statutory bodies" would be exempted from its enforcement. LegCo member Ronny Tong, a longstanding proponent of the Competition Law, told Kovacic on December 8 that the proposed exemption of government-affiliated institutions "will be a major issue when the bill is debated." He said, "Many engage in commercial activities and are market participants. It would be unfair if they were exempted." Kovacic noted that regulatory bodies around the world were trending toward bringing commercially active government entities under the enforcement purview of competition laws.

#### PRC Officials Discuss China's AML

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17. (U) After Kovacic gave the keynote address on December 7 at a regional competition law conference sponsored by the Asian Competition Forum, senior PRC officials from the Ministry of Commerce (MOFCOM) and the National Development and Reform Commission (NDRC) updated forum participants about China's efforts to enforce its "Anti-Monopoly Law" (AML) that took effect in August 2008. Director of the Economic Analysis Division in the Anti-Monopoly Bureau at MOFCOM Wang Xuejia said MOFCOM concluded examinations of 60 proposed mergers from August 2008 - October 2009. The majority of reviewed cases were proposed mergers between foreign-owned

companies operating in China, with the next largest category involving the proposed purchase of a Chinese company by a foreign entity. MOFCOM's most well-known merger review resulted in the PRC's March 2009 rejection of Coca-Cola's proposed USD 2.4 billion purchase of China Huiyuan Juice Group. Wang said MOFCOM "could have been more transparent" and "probably should have provided more details about the underlying analytical basis" for its decision in the Coca-Cola case. She said her bureau was "staffing up" and visiting foreign jurisdictions to "get best practices ideas."

18. (U) Deputy Director of the Anti-Monopoly Division of the NDRC Xu Xinyu said his commission shares AML enforcement duties with MOFCOM and the State Administration for Industry and Commerce (SAIC). "Price fixing by cartels is our primary area of focus, and over 30,000 enforcement officers are looking into price fixing in China," he said. He said the NDRC has 50 open investigations into price fixing and is "working on price-fixing rules and regulations to be published soon."

#### China's AML "Organizational Challenges"

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19. (SBU) At the December 7 competition forum, Commissioner Kovacic told participants he thought the PRC was working in good faith and trying to make reasonable decisions while enforcing its AML. He questioned the efficiency and efficacy of China's current AML oversight and enforcement framework, citing the "substantial organizational challenges" inherent in joint AML efforts by three government entities - MOFCOM, SAIC and the NDRC. Kovacic suggested that China should consider joining the International Competition Network (ICN) that fosters communication and cooperation among corporate competition regulators from various nations. But he acknowledged that Taiwan's membership in the ICN could generate reluctance in Beijing.

10. (U) This cable has been cleared by FTC Commissioner Kovacic.  
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